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OCTOBER TERM, 1975.

No. 74-1245.

LIBERTY MUTUAL INSURANCE COMPANY,
PETITIONER,

v.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief of Amici Curiae Commonwealths of Massachusetts and Pennsylvania, States of Florida, Maine, Michigan, Missouri, Wisconsin and Vermont.

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Brief of Amici Curiae Commonwealths of Massachusetts and Pennsylvania, States of Florida, Maine, Michigan, Missouri, Wisconsin and Vermont.

Interest of the Amici Curiae.

The Commonwealths of Massachusetts and Pennsylvania and the States of Florida, Maine, Michigan, Missouri, Wisconsin and Vermont submit this brief by and through their Attorneys General as *amici curiae* pursuant to Rule 42.

The *amici curiae* have pending in their own state courts or human rights agencies approximately 435 cases which involve the issue of the pregnancy exclusion from income protection plans, sick leave, and other types of insurance coverage. Many of these agencies have administrative regulations similar to those of the Equal Employment Opportunity Commission (hereinafter EEOC) Guidelines on Pregnancy and Childbirth. 29 C.F.R § 1604.10 (1972).[1]

The *amici* have a total work force of 17,552,042[2] of whom 6,663,847[3] or 40 per cent are women employed on a full-time or part-time basis. Each commonwealth and state has an interest in assuring equal employment opportunity for all of its citizens and thus submits this brief on behalf of themselves and on behalf of citizens who are or may be affected by the issue before this Court.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported at 511 F. 2d 199 (1975). The opinion of the District Court for the Western District of Pennsylvania is reported at 372 F. Supp. 1146 (1974) and its memorandum order (Pet. App. pp. A49-A51), denying the motion for reconsideration filed by petitioner Liberty Mutual Insurance Company (hereinafter "Liberty" or the "Company") is reported at 372 F. Supp. 1163 (1974).

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[1] *See, e.g.*, Massachusetts Commission Against Discrimination Regulations, § 3, promulgated May 24, 1973. The language of the relevant portions of these regulations is identical to that of the EEOC guidelines.

[2] U.S. Bureau of the Census, *Census of Population:* 1970, Part 1, § 1, Table 161.

[3] *Id.*

Jurisdiction.

The judgment of the Court of Appeals, affirming the judgment of the District Court, was entered on February 11, 1975. A timely petition for writ of certiorari was thereafter filed on April 2, 1975, and granted on May 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute Involved.

Section 703(a) (1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (1) (hereafter Title VII), provides that:

> "It shall be an unlawful employment practice for an employer —
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin. . . ." (Emphasis added.)

Question Presented.

Does a disability insurance plan, to which employees must subscribe as a condition of employment, violate Title VII if pregnancy-related disabilities are the only sex-unique disabilities excluded from the plan?

Statement of the Case.

Petitioner Liberty Mutual Insurance Company provides a disability income protection plan to its employees as a condition of employment. The employer funds approximately two-thirds of the cost of the plan. This plan provides benefits in the form of income paid to employees for non-occupational disabilities which necessitate an absence of eight or more days.

Employees with less than five years of service receive two-thirds of their salary to a maximum of $150 per week, for 103 weeks, and employees with more than five years of service receive two-thirds of their salary to a maximum of $275 per week up to the age of 65.

The plan covers nearly all short-term and long-term disabilities, including sex-unique disabilities such as prostate conditions and vasectomies, as well as disabilities from voluntary cosmetic surgery or those arising from voluntarily undertaken activities such as drunken driving or skiing. The only sex-unique disabilities excluded from coverage are disabilities "due to pregnancy or any cause related to pregnancy."[4] *Amici* urge that these exclusions constitute sex discrimination within the meaning of Title VII.

In February of 1972 plaintiffs-respondents, on behalf of themselves and all other female technical employees of Liberty Mutual's Claims Department, filed a complaint in the United States District Court for the Western District of Pennsylvania charging that Liberty Mutual discriminated against women in

[4] Liberty Mutual Insurance Company 1970 brochure. Also excluded are disabilities due to "any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, or for any disability which does not require throughout its continuance, the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures." Brief for Petitioner, Appendix at 3, *Liberty Mutual Ins. Co.* v. *Wetzel*, No. 74-1245.

violation of Title VII. Discrimination was alleged both in job classifications and promotions, and in compensation and benefits which include the disability income protection plan. All issues except the exclusion of pregnancy from the Company's income protection plan have been resolved or are still pending before the District Court.

The District Court granted summary judgment to plaintiffs on January 9, 1974, on the issue of the Company's exclusion of pregnancy-related disabilities. A motion by Liberty Mutual for reconsideration was denied by the District Court.

The Third Circuit Court of Appeals affirmed the District Court judgment on February 11, 1975.[5] It held that this Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), was not dispositive because Title VII involved statutory interpretation rather than constitutional analysis,[6] and that Liberty Mutual's income protection plan violated Title VII because it treated a protected class of persons in a disparate manner.[7]

Summary of Argument.

This case challenges the exclusion of pregnancy-related disabilities from the Company's income protection plan as a violation of Title VII. Specifically, the exclusion constitutes sex discrimination within the meaning of Title VII because pregnancy-related disabilities are the only sex-unique disabilities excluded from the Company's plan. Disabilities unique

[5] *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F. 2d 199 (3d Cir. 1975).

[6] *Id.* at 203.

[7] *Id.* at 206.

to men — prostatectomies, vasectomies — are included in the Company's plan.

Respondents have delineated a claim of sex discrimination under Title VII by demonstrating that the Company's policy turns on a sex-based distinction and has a disparate impact on women only. The Company has failed to vindicate its discriminatory policy by raising the business necessity defense or any defense permissible under Title VII.

The decision by this Court in *Geduldig* v. *Aiello*, *supra*, has no relevance to the present case because it concerned an Equal Protection challenge to the validity of a state statute under the Fourteenth Amendment. Title VII reflects Congress' commitment broadly to proscribe all forms of sex discrimination. The judicial standards for evaluating Fourteenth Amendment and Title VII claims are fundamentally different and *Geduldig* must be distinguished on those grounds.

We respectfully submit that the decision of Court of Appeals for the Third Circuit should be affirmed.

Argument.

I. The Company's Policy Denies Women Equal Employment Opportunities Guaranteed to them by Title VII.

Title VII's provisions prohibiting discrimination because of sex are as extensive as those relating to race, religion and national origin.[8] The purpose of Congress in enacting Title

[8] *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Gilbert* v. *General Electric Co.*, F. 2d (4th Cir. 1975), 10 CCH Emp. Prac. Dec. ¶10, 269, *pets. for cert. filed*, 44 U.S.L.W. 3067 (U.S. 1975) (Nos. 74-1589, 74-1590); Note, *Developments — Title VII*, 84 Harv. L. Rev. 1109, 1175 (1971).

VII was unmistakably clear: to create a comprehensive statute proscribing all forms of sex discrimination — overt and subtle. As one court cogently put it: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[9] *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971).

Sexual equality in employment mandates that all barriers to a woman's full participation in the work force be eliminated. An industrial policy which excludes pregnancy-related disabilities from income protection plans has negative economic and social consequences for both the employer and society at large.[10]

A company's interest in assuring job stability and continuity is advanced by the inclusion of pregnancy in its income protection plan. The Company and its *amici* cite statistics which reflect the numbers of women who elect to remain at home after a maternity leave. These statistics are misleading as future indicators of a woman's likelihood to return to work.[11] For years various factors have operated to discourage and even prevent a woman from having an uninterrupted vocational life: mandatory maternity leave,[12] loss of seniority[13] or even

[9] Indeed, Congress rejected an amendment that would have restricted the act to prohibiting only discrimination based "solely" on an employee's sex. 110 Cong. Rec. 2728, 13,825 (1964).

[10] *See generally Trial* 11:86-87, May — June, 1975; Weyand, *Baring the Cost of Bearing*, 11 *Trial* 86 (May — June, 1975).

[11] *Id.*, at 23; *See also* Women's Bureau, Employment Standards Admin., U.S. Dept. of Labor, *The Myth and the Reality*, (Rev. May, 1974).

[12] *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

[13] *Satty* v. *Nashville Gas Co.*, F. 2d , Civil No. 75-1083, 10 Emp. Prac. Dec. ¶10, 359 (6th Cir., Aug. 8, 1975).

job position after maternity leave or pregnancy,[14] low-paying, dead-end jobs.[15] As these hurdles to job security and continuity are removed the work expectancy of women will increase because they will have more incentive to remain on the job. One of the major obstacles is the interruption of employment by pregnancy and its attendant problems. Affording a woman coverage during periods of disability due to pregnancy encourages women to return to the job and promotes the employer's interest in retaining a satisfied and loyal employee.[16]

The conjecture that women will take unfair advantage of an extended maternity leave[17] embodies an unjustifiable presumption, rooted in sexual stereotypes, that women have cavalier attitudes toward their jobs, are not the "breadwinners" in their families and so can be left without income during a period of disability. To the contrary, statistics demonstrate that women are working because of a compelling financial need to do so. In 1973, there were 35 million women in the labor force; about 13 million of these women were working mothers.[18] The number of working mothers has increased eightfold since the period preceding World War II; four out of ten mothers

[14] *Holthaus* v. *Compton & Sons, Inc.*, 514 F. 2d 651 (8th Cir. 1975).

[15] Women's Bureau Employment Standards Admin., U.S. Dept. of Labor, *Twenty Facts on Women Workers*, 1 (Rev. June, 1975).

[16] Lester P. Schoene, representing the Committee of the Railway Labor Executives' Association, Hearings on H.R. 1362, 79th Cong., 1st Session, Before the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess., at 1112 (1945).

[17] *Hutchison* v. *Lake Oswego School District*, 374 F. Supp. 1056, 1064 (D. Ore. 1974), *aff'd in part, rev'd in part*, 10 CCH Emp. Prac. Dec. ¶10,325 (9th Cir. 1975). Weyand, *Baring the Cost of Bearing, supra*, note 10, at 87.

[18] Women's Bureau, Employment Standards Admin., U.S. Dept. of Labor, *Women Workers Today*, 1, 3 (Rev. 1974).

were in the labor force in 1971 compared with three out of ten in 1960 and less than one out of ten in 1940.[19] Approximately 20 million of these women are working because they are single, divorced, widowed or have husbands who earn less than $5,000 a year.[20] For these women, the income from their jobs is vital. Work is a serious continuing necessity for them, not a short-term supplementary source in income. In 1970, 33 per cent of all families headed by a woman lived in poverty and many others were close to the poverty line.[21]

The economic impact of an unprotected period of disability caused by pregnancy can be devastating. An extreme example, but one which illustrates the impact of this absence of income protection on so many working women, is that of the plaintiff in *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, F. 2d , (4th Cir. 1975), *pets. for cert. filed*, 44 U.S.L.W. 3067 (U.S. 1975) (Nos. 74-1589, 74-1590). This employee worked until five weeks before the birth of her child. She was forced to apply for welfare aid for funds. While she awaited payment, her electric and gas service were cut off, leaving her family without heat, financially destitute while she was disabled from pregnancy. *Gilbert, supra*, 375 F. Supp. at 381, n. 12. It is a denial of equal employment opportunity to deprive women of the sense of security and expectation of continued employment afforded to male employees by the existence of an income protection plan.

[19] Women's Bureau, Employment Standards Admin., U.S. Dept. of Labor, *Who are the Working Mothers?* 3 (Rev. 1972). *See also* Hayghe, *Marital and Family Characteristics of the Labor Force in March 1973*, 97 Monthly Lab. Rev. 21 (April 1974); Jacobson, *Women Workers: Profile of a Growing Force*, 81 American Federationist 9 (July 1974).

[20] Weyand, *Baring the Cost of Bearing, supra*, note 10, at 87.

[21] Women's Bureau Employment Standards Admin., U.S. Dept. of Labor, *Who Are the Working Mothers?* 3 (Rev. 1972).

The social costs of discouraging full participation by women in the work force are serious. There are economic costs to society generated as women who need income to survive and to maintain their families find welfare aid necessary. In addition, society suffers the significant loss of women's contributions to the work force.

Employer practices penalizing women who become pregnant interfere with one of the most fundamental freedoms belonging to a woman, "the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-542 (1942). Policies which require women to leave their jobs due to pregnancy without compensation force them to choose between employment and pregnancy. *Hutchison* v. *Lake Oswego School District*, 374 F. Supp. 1056, 1063 (D. Ore. 1974).

Liberty Mutual's income protection plan, failing as it does to include benefits for pregnancy disabilities, not only penalizes pregnant women, but affects the contributions of all women to the labor force, and, consequently, society as a whole. We submit that the Company's policy is discriminatory and contravenes the public interest.

II. The Company's Exclusion of Pregnancy from its Income Protection Plan is Sex Discrimination Within the Meaning of Title VII.

A. *EEOC Guidelines are Consistent with Congressional Intent to Eliminate All Forms of Sex Discrimination and are Entitled to Judicial Deference.*

Rather than attempting to catalog practices that would violate Title VII, Congress created the Equal Employment Opportunity Commission ("EEOC") and charged it with enforcement of Title VII and with the authority to issue guidelines to carry out its provisions. 42 U.S.C. §2000e-5, 12.

In 1972, the EEOC issued guidelines on the treatment of pregnancy and childbirth in employment policies.[11] Contrary to the Company's assertion, the EEOC did not make a sudden reversal in 1972 of a previously well established policy regarding disabilities related to pregnancy.[13] No guidelines setting forth the EEOC policy were issued by the EEOC on the subject of pregnancy benefits until 1972. On the contrary, EEOC policy evolved gradually on this question. In publish-

[11] The EEOC guidelines provide, in relevant part: "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C.F.R. § 1604.10(b).

[13] The various opinion letters cited by Liberty Mutual deal with the EEOC's previous position that generally either equal benefits or equal contributions by employers must be available for both sexes where insurance and medical plans are provided. These decisions do not expressly mention pregnancy. At the time, this policy was consistent with that taken under the Equal Pay Act by the Department of Labor and under Executive Order 11246 (3 C.F.R. 339) by the Office of Federal Contract Compliance. *See* 1966 EEOC Ann. Rep. 40-42; EEOC General Counsel Letter G.C. 158-65 (October 12, 1965) and G.C. 588-65 (January 28, 1966) cited in EEOC First Annual Digest of Legal Interpretation (1966) at 22-23.

Another decision cited by Liberty Mutual deals with the EEOC's position that maternity leave must be granted even if an employer does not grant sick leave in order to provide substantial equality of employment opportunity to women. EEOC Dec. No. 70-360 (Dec. 16, 1969) (CCH Emp. Prac. Guide ¶6084).

ing its 1965 guidelines on sex discrimination, the EEOC did not treat the subject of pregnancy, but noted the need for further experience in dealing with sex discrimination and acknowledged its own caution in publishing initial guidelines.[24] In March, 1971, before Congress enacted the 1972 Civil Rights Act,[25] the EEOC issued a decision specifically holding that exclusion of disability due to pregnancy from an employer's insurance program discriminated because of sex within the meaning of § 703(a) of Title VII.[26]

The history of the 1972 Act reveals a concern for the serious problems of sex discrimination. Congress recognized the progressively deeper involvement of the EEOC in combatting sex discrimination as well as the enormity of the tasks remaining. *See* H. R. Reg. No. 92-238, 92d Cong., 1st Sess. 4 (1971). While the available legislative history is scant on the precise issue of treatment of pregnancy, it is entirely consistent with, and supportive of, the guidelines which the EEOC formulated after taking the necessary time to establish policy in a relatively uncharted area.

Liberty Mutual's disability income protection plan does not treat pregnancy-related disabilities as it does all similar temporary disabilities.[27] It totally excludes disabilities caused by both normal and abnormal pregnancies from any income protection.[28] Under the EEOC interpretive guideline this practice would clearly violate Title VII.

[24] 30 Fed. Reg. 14927 (Dec. 2, 1965). *See* Brief for EEOC as *Amicus Curiae* at 10, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), for an explanation of EEOC's evolving position.

[25] Civil Rights Act of 1964 (Title VII), 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e *et seq.*

[26] EEOC Dec. No. 71-1474 (March 19, 1971) (CCH Emp. Prac. Guide ¶6621).

[27] *See supra* at n. 4.

An interpretation of Title VII by the EEOC, the enforcing agency, is entitled to great deference. *Griggs* v. *Duke Power Company*, 401 U.S. 424, 434 (1971); *Phillips* v. *Martin Marietta Corporation*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring); *Sprogis* v. *United Air Lines, Inc.*, *supra*, at 1198; *Communications Workers of America* v. *American Telephone and Telegraph Company, Long Lines Dept.*, 513 F. 2d 1024, 1030 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3067 (U.S. June 19, 1975) (No. 74-1601). As the agency charged with receiving complaints of discrimination under Title VII, the EEOC is best situated to gather experience over time with the types of practices that have the effect of denying equal employment opportunity to women. It is because of an enforcing agency's experience and expertise in administering a statute that courts give deference to that agency's interpretation of a statute. *Griggs*, *supra*; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Nearly all the lower federal courts that have considered the EEOC guidelines and the available legislative history have upheld and relied upon the guidelines as a correct interpretation of the intent of Title VII on the question of employer policies concerning pregnancy and childbirth.[29]

[28] In the Company's brief to this Court, it is asserted, contrary to the representation of the Company's counsel before the Court of Appeals, that its plan would cover disabilities suffered by a pregnant woman which do not arise "wholly and solely from pregnancy." Brief for Petitioner at 16, n. 26. While the import of this statement is less than clear, it may be intended to suggest that diseases such as hypertension and diabetes, which are often seriously aggravated by the weight gain associated with pregnancy, would be covered.

[29] *Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dept.*, 513 F. 2d 1024 (2d Cir. 1975); *Gilbert* v. *General Electric Co.*, F. 2d (4th Cir. 1975); *Vineyard* v. *Hollister School District*, 64 F.R.D. 580 (N.D. Cal. 1974); *Farkas* v. *South Western City School District*, 506 F. 2d 1400 (6th Cir. 1974); *Satty* v. *Nashville Gas Co.*, F. 2d , Civil No. 75-1083 (6th Cir., Aug. 8, 1975), 10 Emp. Prac. Dec.

Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), cited by the Company, has no applicability to this case. At issue in *Espinoza* was an EEOC interpretive guideline[30] concerning the relationship of citizenship and national origin. *Supra* at 92. In determining that the guideline was inapplicable to the factual situation before it, the Court reasoned that Congress had not intended to bar discrimination against non-citizens in enacting Title VII. It found that the existence of several federal statutes and Civil Service regulations which permitted discrimination against non-citizens gave clear indications that Congress had not reached that type of discrimination in enacting Title VII. In contrast, there are no clear indications in this case of Congressional intent contrary to the EEOC guidelines. Indeed, both the Office of Federal Contract Compliance and the Office of Civil Rights of the Department of Health, Education and Welfare have proposed regulations adopting the position put forth in the EEOC guidelines at issue here.[31]

¶10,359; *Hutchison* v. *Lake Oswego School District*, 374 F. Supp. 1056 (D. Ore. 1974); *contra: Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973).

[30] 29 C.F.R. § 1606.1(d) (1972).

[31] O.F.C.C. proposed guidelines, 38 Fed. Reg. 35336 § 60-20.3(h) (2) (December 27, 1973); H.E.W. proposed new rules under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, 39 Fed. Reg. 22237 § 86.47(c) (June 20, 1974). These guidelines deal with a subject considered beyond the reach of the Equal Pay Act. The issue of disability treatment of pregnancy and of maternity payments has been ruled by the administrator of the Wage and Hour Division as involving conditions of employment rather than wages and, therefore, outside the scope of the Equal Pay Act. 29 C.F.R. 800.110 (1967).

In *Satty* v. *Nashville Gas Co.*, the Sixth Circuit was concerned with whether an employer's policy regarding pregnancy violated Title VII. The specific issue involved the relationship of pregnancy leave to loss of seniority and sick leave. The court held that: ". . . absent clear indicia in the form of legislative history that the agency interpretation is unreasonable or unnatural, we must defer to the Commission's construction of the statute as articulated under 29 C.F.R. § 1604.10(b)."

In this case, the EEOC guideline is clearly consistent with Congressional intent to reach the entire spectrum of sex discrimination and with the letter and spirit of Title VII. The Court should therefore defer to the EEOC guideline and find that the Company's policy of excluding pregnancy from its income protection plan violates Title VII.

B. *The Company has Not Raised Any Defenses Permissible under Title VII which Defeat the Respondents' Case of Sex Discrimination.*

1. Respondents have Established a Firm Case of Discrimination under Title VII.

The determinative issue before this Court is whether respondents have made out a case of discrimination under Title VII and whether the Company has justified its policy by successfully raising the defenses permissible under the statute. In the present case, we respectfully submit that respondents have established a firm case of discrimination, and that the Company has not sustained its burden of articulating a legitimate, non-discriminatory defense for the exclusion of pregnancy from its income protection plan.

Discrimination in violation of Title VII occurs both through distinctions based on sex, race, religion, color and national origin and through the application of apparently neutral

policies which have a disparate effect on a particular group. The Company's policy of excluding pregnancy from its income protection plan is discriminatory both because it creates a distinction based on sex and because it has a disparate, adverse impact on women.

In the context of the Company's income protection plan, the exclusion of pregnancy is discriminatory on its face. As a sex-linked phenomenon, pregnancy relates only to women. Although pregnancy is not the only excluded disability, it is the ony sex-unique disability which is so excluded. Thus, the exclusion of that condition from coverage constitutes a facially discriminatory practice because it treats women, a protected class under Title VII, differently from men on the basis of their sex.[32]

The only statutory defense to facially discriminatory conduct is the exception generally known as the Bona Fide Occupational Qualification (BFOQ). Section 703(e) (1), 42 U.S.C. § 2000e-2(e) (1). The employer must demonstrate that sex is a BFOQ reasonably necessary to the normal operation of its business. No such defense to the Company's policy is available here.

The Company's policy is also discriminatory because it has a disparate, adverse effect on women. This Court, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), established the principle that an apparently neutral policy can have an adverse effect on a particular class. Here, the impact of the pregnancy falls only on women and denies them coverage which their male counterparts enjoy for similar, sex-unique disabilities, such as prostatectomies and vasectomies.

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[32] *See, e.g., Cheatwood* v. *South Central Bell Telephone & Telegraph Co.*, 303 F. Supp. 754 (M.D. Ala. 1969); *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

The Company contends that excluding pregnancy as a disability from its income protection plan is not sex-discrimination because the program divides potential recipients into two classes: pregnant and non-pregnant persons, with both men and women in the latter class. The structural basis for this conclusion is infirm and should be rejected by the Court in this case.

The fact that only *some* women will be affected does not validate the Company's policy. In rendering its decision in *Sprogis* v. *United Air Lines*, the Fourth Circuit interpreted § 703(a) and considered the legislative history in determining what constituted sex-discrimination. 444 F. 2d at 1197-1198. In *Sprogis*, the issue before the court was whether the airline's no-marriage rule for stewardesses discriminated on the basis of sex since it was not applied to male stewards or other female employees. The court deemed irrelevant the fact that not all women employees were subject to the company's rule, on the grounds that sex was *a* factor in the application of the rule.

> "Section 703(a) (1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of a seemingly neutral policy." 444 F. 2d at 1198.[33]

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[33] *Cf. Cheatwood* v. *South Central Bell Telephone & Telegraph Co.*, 303 F. Supp. 754 (M.D. Ala. 1969), where the court held that not all women could be excluded as commercial representatives despite expert testimony that 25 per cent-50 per cent of all women could probably not physically perform the job.

In proving up a discrimination case under Title VII one need not prove that race or sex is the sole factor operating in a defendant's conduct, only that it is *a* factor. *Smith* v. *Sol D. Adler Realty Co.*, 436 F. 2d 344 (7th Cir. 1971).

In examining the pregnancy policies of employees within the meaning of Title VII, numerous courts have found violations of the Act. In a case factually identical to the one before this Court, the Fourth Circuit Court of Appeals held the denial of pregnancy-related disability benefits to be a violation of Title VII: "A disability program which, while granting disability benefits generally, denies such benefits expressly for disability arising out of pregnancy, a disability possible only among women, is manifestly one which can result in a less comprehensive program of employee compensation and benefits for women employees than for men employees; and would do so on the basis of sex." *Gilbert* v. *General Electric Co.*, *supra*, at 5121. In rejecting the argument that pregnancy was functionally distinguishable from other kinds of disabilities the court emphasized that other "voluntary" disabilities such as cosmetic surgery and attempted suicides were covered, *supra*, at 5121. Most significantly, the *Gilbert* court distinguished *Geduldig* on the ground that *Geduldig* turned on the legitimacy of a legislative classification under the Fourteenth Amendment and not on a statutory interpretation of Title VII. Utilizing similar analysis, the Second Circuit reached the same conclusion about *Geduldig* in finding a violation of Title VII for an employer's exclusion of pregnancy from its income protection plan. *Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dept.*, 513 F. 2d 1024 (2d Cir. 1975).[34] This case involves essentially the same issues

[34] Courts have uniformly held that employers who fail to compensate women employees (sick pay) for absences relating to pregnancy are discriminating on the basis of sex in violation of Title VII: *Dessenberg* v. *American Metal Forming Co.*, 8 CCH Emp. Prac. Dec. ¶9575 (N.D. Ohio 1973); *Farkas* v. *South Western City School District*, 508 F. 2d 1400 (6th Cir. 1974); *Lillo* v. *Plymouth Board of Education*, 8 CCH Emp. Prac. Dec. ¶9510 (N.D. Ohio 1973); *Satty* v. *Nashville Gas Co.*, F. 2d , Civil No. 75-1083 (6th Cir., Aug. 8, 1975); *Hutchison* v. *Lake Oswego School District*, 10 CCH Emp. Prac. Dec. ¶10,325 (9th Cir. 1975), *aff'g in part, rev'g in part* 374 F. Supp. 1056 (D. Ore. 1974).

and the decision of the Third Circuit court should therefore be affirmed (*supra*, at n. 5).

2. The Company has Not Justified its Discriminatory Policy by Raising the Defenses Permissible under Title VII.

In the present case the respondents have established their case of discrimination: the Company's policy makes distinctions based on sex and has a disparate impact on a protected class. Once the plaintiff establishes a case of discrimination the burden shifts to the defendant to assert "some legitimate, nondiscriminatory reason" for the allegedly discriminatory conduct. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). The Company has raised several defenses which, upon inspection, all fail for want of legal validity under Title VII.

When a challenged policy has a disparate impact on a protected class courts have permitted employers to raise the business necessity defense. *See Griggs* v. *Duke Power*, *supra*. In order for the defense to be sustained the employer must meet the requirements as set out in *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (4th Cir. 1971): "the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced." The only defense advanced by petitioner which could come within the ambit of the business necessity doctrine is the contention that the inclusion of pregnancy in an income protection plan would be prohibitively expensive. Without more, it is highly doubtful that cost alone could constitute a proper defense to such a charge: "While considerations of economy and efficiency will often be relevant to determining the existence of business necessity,

dollar cost alone is not determinative." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 799, n. 8 (4th Cir. 1971). *Hutchison* v. *Lake Oswego School District*, 10 CCH Emp. Prac. Dec. ¶10,325, 5326 (9th Cir. 1975); *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367, 382 (E.D. Va. 1974).

Even assuming, *arguendo*, that cost would constitute a valid business necessity, the Company has failed to show that its cost estimates are not speculative and hypothetical or that no acceptable alternatives exist to reduce cost.

The Company's cost estimates are based on unreliable predictions about the number of women in that company's work force who will bear a child while employed, the amount of time each will be disabled,[35] and the frequency that the pregnancy will be complicated by other medical conditions. There is no precise way for Liberty Mutual to calculate the birth rate for its female employees. In addition, some estimates erroneously include the cost of benefits extending far beyond the period of actual physical disability. It is imperative to keep in mind that disability would extend only to the actual period of physical incapacity and not time devoted to child-rearing.[36] Maximum benefits should be allowed only while the woman is actually disabled. The determination as to when childbearing ends and child-rearing begins should be carefully made on an individual basis by a physician.

[35] Estimates vary as to the period of disability for a normal pregnancy: some physicians are of the opinion that the period of disability ranges between 10 days and 3 weeks after delivery; others estimate that most women are unable to work for a period of between six and eight weeks following a normal pregnancy. *Love's Labors Lost; New Concepts of Maternity Leaves*, 7 Harv. Civ. Rights Civ. Lib. L. Rev. 280 (1972); Zimmerman, Comment, *Geduldig* v. *Aiello; Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Colum. L. Rev. 441 (1972).

[36] *See Comment, Geduldig* v. *Aiello*, 75 Colum. L. Rev. 441 (1975); *Hayden, Punishing Pregnancy; Discrimination in Education, Employment and Credit;* ACLU Women's Rights Project, October, 1973.

Another factual consideration missing from the Company's cost argument is data concerning the overall absenteeism rate for men and women. A recent Public Health Service study dispels the myth that women employees are absent from work more than their male counterparts and demonstrates that there is little actual difference in the absentee rate due to illness or injury between men and women: 5.6 days a year for women as compared with 5.2 for men.[37]

Even if the Company had presented evidence indicating that the inclusion of pregnancy coverage would provide greater economic benefit to women it would not constitute a valid defense under Title VII. In order to equalize employment opportunities and working conditions for women employers the Company must adjust its policy to accommodate what one court has termed "women's biologically more burdensome place in the scheme of human existence." *Gilbert* v. *General Electric Co.*, *supra* at 383; *see also Sale* v. *Waverly Shell Rock Board of Education*, 390 F. Supp. 784, 788 (N.D. Iowa, 1975). The Company has presented no evidence to meet the requirements of the business necessity defense as set forth in *Robinson*, *supra*, and thus has not rebutted the respondent's case of discrimination.

The Company has raised another defense for its policy by asserting that pregnancy is functionally distinguishable from other disabilities. Pregnancy shares with other disabilities the same salient features — a physical inability to work and the expense of medical attention. Characterization of pregnancy as a voluntary condition which makes it qualitatively different from other disabilities is an inaccurate and irrelevant articulation of the issue. The fact that some pregnancies are planned and entered into willingly is, quite simply, beside the point. As one court so aptly put it: "'The perpetuation of the human

[37] Women's Bureau Employment Standards Admin., U.S. Dept. of Labor, *The Myth and the Reality* (Rev. May, 1974).

race cannot be termed a voluntary act, but it rests upon instincts and desires, which are fundamentally imperative.'" *Black* v. *School Committee of Malden*, Mass. Adv. Sh. (1974) 637, 310 N.E. 2d 330, 339 n. 18. This Court has recognized that, like race and national origin, sex "is an immutable characteristic determined solely by the accident of birth." *Frontiero* v. *Richardson*, 411 U.S 677, 686 (1973). That only women may become pregnant is undeniable. To distinguish pregnancy from other disabilities on the ground that it is voluntary is meaningless because no options are available for those men and women who wish to have a natural child.

The "voluntariness" argument is further undermined by the fact that other "voluntary" disabilities are included in the Company's income protection plan — cosmetic surgeries, vasectomies, prostatectomies. Pregnancy-related disabilities are the only sex-unique disabilities which are not covered by the Company's income protection plan.

A significant number of pregnancies are involuntary since no foolproof method of contraception has been developed. Although birth control methods have substantially improved over the last few years, the failure rate of various devices is significant.[38] In addition, many of the most effective methods of contraceptions present serious medical hazards to some women.

Many disabling situations occur as a result of involuntary pregnancies or as complications of a voluntary pregnancy. The rape-induced pregnancy is one example of an involuntary conception. Due to the high number of unreported rapes, it is

[38] The following are the number of pregnancies occurring per 100 women per year resulting from the failure of contraceptive devices: (1) Oral contraceptives: 2 to 5 pregnancies; (2) Diaphragm: 20 to 25 pregnancies; (3) Intra-uterine devices: 6 pregnancies; (4) Coitus interruptus: 20 to 25 pregnancies; (5) Rhythm (calendar): 35 pregnancies; (6) Condom: 15 to 20 pregnancies. *Contraceptive Technology 1974-1975* at 11, Emory Family Planning Program, Emory University Medical School, Atlanta, Georgia.

difficult to obtain statistics on the number of women who become pregnant as the result of a rape. Abnormal pregnancies, which were not considered by this Court in *Geduldig*, are never bargained for and must be terminated in order to save the mother's life. Ectopic pregnancies, ones in which the fertilized egg attaches in the fallopian tube rather than the uterus, are potentially fatal, and occur with varying frequency depending on the woman's overall health.[39] About 10 per cent of pregnant women miscarry. Detachment and mislocation of the placenta are also common complications of pregnancy that require immediate surgery. Abortions presumably would also be excluded — even to prevent the birth of children with birth defects or genetically fatal diseases such as Tay-Sachs disease. All of these conditions to which only women are susceptible are not covered by the Company's plan.

The respondents have established a case of sex discrimination which has not successfully been rebutted by the Company. The defenses it has raised are not determinative in scrutinizing an employer's pregnancy policies within the mandate of Title VII.

III. The Decision in Geduldic v. Aiello did Not Reach Sex Discrimination Proscribed by Title VII and Therefore it is Not Dispositive of this Case.

The Company contends that *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), is controlling in the instant case. We submit that the Court of Appeals for the Third Circuit was correct in holding that *Geduldig* is not dispositive of the issues presently before this Court and that the factual distinctions in this case mandate an affirmance of the lower court's decision. *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F. 2d 199 (3d Cir. 1975).

[39] *See, e.g.*, Novak, *Textbook of Gynecology*, 8th ed. 1970, at 497.

The critical factor which differentiates the two cases is that *Geduldig* involved a challenge to a state statute under the Equal Protection Clause of the Fourteenth Amendment and this case concerns an employer practice subject to the reach of Title VII, a statute specifically enacted to insure full equality in employment. In *Geduldig* the Court's concern focused on a statutory insurance system administered by the State of California which issued and paid benefits to persons in private employment not otherwise covered by privately offered plans. The plan was funded entirely form contributions deducted from the wages of participating employees. The State elected not to cover conditions resulting from a person's court commitment as a dipsomaniac, drug addict, or sexual psychopath and disabilities relating to normal pregnancies.[40]

The fact that this Court sustained the validity of California's statute against an Equal Protection challenge fundamentally reflects this Court's traditional concern with granting states discretion in addressing their own problems. State legislative enactments carry with them a *prima facie* presumption of validity against Fourteenth Amendment challenges. *McGowan* v. *Maryland*, 366 U.S. 420, 425-426 (1961). In determining the constitutional validity of a state legislative enactment under the Fourteenth Amendment courts first assess whether the statute rationally serves a legitimate government objective. *See, e.g., Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972). The standards of judicial review are confined to the rationality of the state's judgments, and do not probe either the wisdom or perfection of the legislation involved. *See Dandridge* v. *Williams*,

[40] As a result of a suit brought by a woman who had suffered an ectopic pregnancy the California state court construed § 2626 as providing benefits for disabilities resulting from abnormal and involuntary complications of pregnancy. *Rentzer* v. *Unemployment Insurance Appeals Board*, 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973).

supra, at 485; *Williamson* v. *Lee Optical Co.*, 348 U.S 483, 489 (1955).

In the area of social welfare and economics, courts are especially deferential to state legislation. *See Dandridge* v. *Williams*, *supra*, at 485; *Jefferson* v. *Hackney*, *supra*, at 546. The judiciary appreciates the fact that the balancing of competing interests and fiscal needs is a delicate and difficult task, one which is most appropriately done by the state legislatures. This Court recognized this fact in *Jefferson* v. *Hackney*, *supra*, at 546-547. "The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them."

The outer limits of a court's inquiry are whether the state statute is invidious; if so, it crosses the threshold of presumptive validity and is declared unconstitutional. *See Jefferson* v. *Hackney*, *supra*, at 546; *Geduldig* v. *Aiello*, *supra*, at n. 20, p. 496. Thus, the Court in *Geduldig* found that the legislative policies to be furthered by the California program and the probable effects on the self-sustaining nature of the program of inclusion of pregnancy-related disabilities provided a nondiscriminatory basis for California's decision not to "create a more comprehensive social insurance program than it already has." *Geduldig*, *supra*, at 496.

The Company has greatly overextended the reach of *Geduldig* and misplaced its reliance on the Court's language in footnote 20.[41] Contrary to the Company's contentions, the footnote deals only with the standards to be applied in weighing the constitutional validity of legislative classifications under the Fourteenth Amendment. *See Communications Workers* v. *American Tel. & Tel. Co., Long Lines Dept., supra.* It in no way addresses sex-discrimination under Title VII; nor does it

[41] "Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Geduldig*, *supra*, at n. 20, pp. 496-497.

posit a test of validity for that Act. In the present case there is no challenge to state legislation on constitutional grounds. Here, the Company's practice is challenged as a violation of a statute which Congress enacted to deal specifically with discrimination in the area of employment.

Under the Commerce Clause of the Constitution, Article 1, § 8, cl. 3, Congress, in the exercise of its plenary power over interstate commerce, may regulate commerce or anything which affects it in an economic or non-economic way. *See* S. Rep. No. 872, 88th Cong., 2d Sess. 12 (1964). In enacting Title VII, Congress exercised this power to prohibit discriminatory practices in private employment which would inhibit interstate commerce. *Id.*

The Ninth Circuit, in a case challenging the denial of sick leave for a pregnancy-related disability as violative of the Equal Protection Clause and Title VII, recently distinguished the two provisions. *Hutchison* v. *Lake Oswego, supra.* With respect to the constitutional claim, the court found that *Geduldig* applied because the plaintiff had not demonstrated that the school board's policy was a "mere pretext designed to effect an invidious discrimination," *supra,* at 5324. However, the court had no difficulty in finding a Title VII violation; it reasoned that footnote 20 in *Geduldig* was inapplicable because Title VII was not at issue in that case, and emphasized that the sweep of the Act was comprehensive and unequivocal, unlike the Equal Protection Clause. In conclusion, the court held that: "clearly, a sick leave policy which excludes from coverage absences related to pregnancy or child-birth adversely and disparately affects women with respect to employment benefits." *Supra,* at 5325. Other courts considering the disparity of treatment between pregnancy-related and other disabilities in the context of Title VII have so concluded. *See* text, n. 34, *supra.*

Thus, the standards of review chosen by Congress to evaluate the validity of employee practices under Title VII are different from those used to judge the validity of a legislative action under the Equal Protection Clause. Courts must simply assess the defenses permitted to defeat a charge of discrimination under Title VII — BFOQ and the business necessity doctrine — to determine if they justify a discriminatory practice. There is no need to ascertain whether the Company has a rational basis for its discriminatory actions.

The sweep and standards of Title VII compel the conclusion that *Geduldig* is not dispositive of the issue before this court.

Conclusion.

For the reasons set forth above, the decision of the Court of Appeals for the Third Circuit should be affirmed.

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